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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 13 1993

In the Matter of:

Implementation of Section 3
of the Cable Television Consumer
Protection and Competition Act
of 1992

Tier Buy-Through Prohibitions

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
MM Docket No. 92-262

To: The Commission

COMMENTS OF VIACOM INTERNATIONAL INC.

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Summary

Section 3(b)(8) of the Cable Consumer Protection and Competition Act of 1992 is designed to ensure that customers who choose to subscribe to only the basic service tier ("BST-only subscribers") are able (i) to purchase per channel or pay-per-view programming service without being required to subscribe to any other intermediate service; and (ii) to purchase premium services at the same rates as subscribers who do choose to purchase intermediate services. Viacom submits that, within the realm of premium services, a cable operator may offer a wide variety of discounted program service packages. The only restraint on these packages is that they must be available to BST-only subscribers on the same terms as offered to purchasers of other (non-premium) programming services. Accordingly, Viacom proposes the following bright-line test be used to determine whether discrimination exists under this provision: Is the cost of premium service(s) for BST-only subscribers higher than the cost for such service or services to those who subscribe to the BST together with other basic services or tiers or services? If not, there is no discrimination against BST-only subscribers.

With regard to technical limitations of compliance, Viacom urges the Commission to consider the costs of requiring full addressability and requests that the Commission delay promulgating any regulations with respect to full addressability until after it has concluded its proceeding regarding equipment compatibility.

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COMMENTS OF VIACOM INTERNATIONAL INC.

Viacom International Inc. ("Viacom"), by its attorneys, hereby offers its comments to the Notice of Proposed Rule Making ("NPRM") in the above-captioned proceeding. Viacom, a diversified entertainment company which owns and operates program services, cable systems and other entertainment-related businesses, could be affected substantially by the provisions of the Cable Television Consumer Protection and Competition Act of 1992 pertaining to anti-buy-through and anti-buy-through rate discrimination.

Showtime Networks Inc. ("Showtime"), the Viacom subsidiary which owns and operates the premium program services Showtime, The Movie Channel and FLIX, has a strong interest in these provisions of the Act in light of its ongoing, long-term efforts to encourage cable systems to (i) lower the cost of premium services by, among other methods, offering discounted packages of program services, and/or (ii) add value to premium subscriptions

by offering premium subscribers FLIX, a low-priced, so-called "mini-premium" service, at little or no cost to the subscriber, or by offering an additional, counter-programmed ("multiplexed") feed of Showtime, at no cost to the subscriber.

I. INTRODUCTION

The NPRM seeks comment on Section 3(b)(8) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "Cable Act of 1992" or "the Act"). That provision, which amends Section 623 of the Communications Act of 1934 (the "Communications Act"), prohibits cable operators from (i) requiring subscription to any service tier other than the "basic service tier" ("BST") as a prerequisite to subscribing to video services offered on a per channel or pay-per-view basis¹; and (ii) discriminating between subscribers purchasing only the BST ("BST-only subscribers") and those subscribing to additional non-premium services in the price charged for premium video services. A 10-year exception to these prohibitions is provided for systems unable to comply, and the Commission is allowed to waive the entire provision if compliance would require the cable operator to increase its rates to subscribers.

¹ Section 3(b)(8) treats per channel and pay-per-view services similarly, and in the interest of simplicity, these Comments will only address per channel services, referred to herein as "premium services."

II. ANTI-DISCRIMINATION PROVISION

Viacom generally supports the tentative conclusions of the Commission that: (a) BST-only subscribers may subscribe to premium services without being required to purchase, for example, any additional level of non-premium services (often referred to as "expanded basic"); and (b) BST-only subscribers are entitled to the same rate structure for premium services as other subscribers. NPRM at ¶ 7.

With regard to discrimination, the Commission seeks comment on the types of program service discounts, if any, that an operator may offer consistent with the Act. NPRM at ¶ 8. Neither the statute nor its legislative history provide much guidance on the implementation issues raised in the NPRM with respect to channel discounts in the context of Section 3(b)(8). Viacom believes, however, that it is nonetheless apparent that this section is to be effectuated in a way which does not frustrate acknowledged Congressional intent to establish a regime which -- unless otherwise restricted by the Act -- provides the consumer with as wide a range of reasonable alternatives as possible in the selection and cost of service while, at the same time, not disadvantaging those consumers who do not want to avail themselves of the panoply of choices which may be offered. Viacom submits that the rate discrimination sentence, when read in the context of the buy-through provision, is intended to have

BST-only subscribers treated as a "protected class" in the context of subscription to premium services. Therefore, the rate discrimination prohibited by this provision is discrimination between BST-only subscribers on the one hand and "expanded basic" subscribers on the other in the purchase of premium services.²

The "no rate discrimination" obligation is designed to prevent a cable system from circumventing the buy-through prohibition by making it uneconomical for a BST-only subscriber to purchase a premium service without also buying intermediate services. In other words, without the second sentence of Section 3(b)(8), which prohibits rate discrimination, a system might not be precluded from engaging in subterfuge to avoid the buy-through prohibition. It could, for example, price the à la carte purchase of the premium service so high that it would be economically unreasonable for a customer not to accede to a subscription to the expanded basic service because doing so results in the receipt of more channels for the same (or less) cost as for fewer channels. Indeed, the price discrimination prohibition is a specific application in the anti-buy-through context of the Act's general proscription of evasions.

Viacom proposes that the following simple, bright-line test be used to determine whether discrimination exists under this

² Other price differentiation in retail rates may be imposed for any number of legitimate reasons and do not, without more, constitute impermissible rate discrimination.

provision: Is the cost of a premium service or services for BST-only subscribers higher than the cost for such service or services to those who subscribe to the BST together with other basic services or tiers of services? If not, there is no discrimination between BST-only subscribers "and other subscribers," i.e., the BST-only subscriber will not have been singled out for higher pricing to encourage a purchase of other non-premium services.

Examples will help illustrate the point. Consider a system having the following service prices:

<u>Tier/service</u>	<u>Retail price</u>
BST	\$5
Expanded basic	\$15 additional
Each premium	\$10

Under this example, the Act would require the system to:

(i) offer one premium service to the BST-only subscriber without requiring the purchase of expanded basic; and (ii) to do so for the same price (\$10) as the system offers to a subscriber to both the BST and the expanded basic tier. Consequently, Viacom respectfully submits that the Act allows a cable system the flexibility to do any of the following:

1. Offer discounted multi-premium packages (e.g., any two premiums in combination at a discount (e.g., \$18 for two premiums in the above scenario). If a BST-only subscriber could subscribe to either one premium for \$10 or two premiums for \$18, regardless of whether that customer also gets expanded basic, there is no

discrimination between BST-only subscribers and other subscribers.

Discounted packages of premium services are consistent with the overall policy of the Act, to "ensure that consumer interests are protected in receipt of cable service." Cable Act of 1992, § 2(b)(4). Moreover, multi-premium discounts directly benefit all customers, including BST-only subscribers, who buy premium services, because all subscribers, including the BST-only subscribers, save \$2 when purchasing two premium services under the above example. Further, by increasing sales of premium services, these discounts help consumers indirectly by providing greater revenues to cable operators and programmers, which result in better programming, technology and customer service. The Act simply requires that these pro-consumer benefits be made available to BST-only subscribers on the same terms as other subscribers.

Moreover, it is irrelevant whether discounted packages are channel specific, as long as a BST-only subscriber is not obligated to purchase services that other subscribers need not purchase in order to obtain any particular package of services. For example, a system may have a "Value Package" of Showtime and HBO for \$18, a "Great Value Package" of Showtime, HBO and Disney for \$24, and a "Really Great Value Package" of Showtime, HBO, Disney and either Cinemax or The Movie Channel for \$28. As long as any and all customers could get any of those packages at those

prices (and any of those services à la carte for \$10), there would be no prohibited rate discrimination under Section 3(b)(8).

2. Conduct promotions offering all new subscribers, or all subscribers "upgrading" to a higher level of service, discounts on installation and/or programming (e.g., "subscribe now and get free installation and get Showtime free for the first month"). Promotions directed to any non-customer, and therefore to any non-subscriber, would, by definition, not be available to any existing "subscribers," be they BST-only subscribers or others. The fact that non-customers become "subscribers" once they avail themselves of the promotional offer should not compel another interpretation unless the promotional discount continues for an unreasonable period of time (perhaps three months) after a person becomes a "subscriber," since, in that case, the distinction between non-subscribers and subscribers begins to lose its significance. Similarly, promotions directed and available to potential upgraders (e.g., offering promotional discounts on premium services to existing non-premium or single-premium subscribers), if available to all subscribers who could be potential purchasers of additional programming (including BST-only subscribers) would not implicate anti-buy-through or discrimination issues. These promotional discounts are designed to induce consumers to take action and are no different from the common practice used by many types of retail operations to offer products at "give away" prices to induce action (e.g., get a gift

worth \$x with your purchase of \$y or more; buy one, get one free).

3. Charge different retail rates for a service depending on the number of premium services also being purchased. An operator could offer discounts to the so-called "mini-" or low-priced premium services such as FLIX or Encore, as long as all of the alternative retail rates offered to subscribers for that service are the same for a BST-only subscriber as they are for a subscriber to additional tiers of expanded basic services. For example, a system could offer FLIX (1) à la carte (with one or more tiers of basic services only) for \$5.95; (2) with one premium for \$3.95; (3) with two premiums for \$1.95; and (4) with three or more premiums at no charge to the subscriber. Offering a reduced price structure for multi-premium subscribers is not precluded by the Act as long as all of the retail rates are available to a BST-only subscriber seeking to purchase premium services on the same basis as to a subscriber to expanded basic services. There simply is no discrimination in the retail pricing structure in the above scenario between BST-only subscribers and other subscribers. To the extent there is rate differentiation, it is between subscribers to various levels of premium services in their capacity as subscribers to the premium services. This is simply another form of volume discount typical in retailing designed to induce subscribers to purchase multiple products by creating value to customers (e.g., theater/ballet/

opera series subscriptions; economy packs of batteries; economy size detergent; rent 8 videos and get 9th free) and is not precluded by the Act.

In sum, as long as discount packages of premium services are equally available to BST-only subscribers, they serve only to enhance consumer choice and lower consumer prices consistent with the overall purposes of the Act, and do not discriminate against BST-only subscribers.

III. TECHNOLOGICAL LIMITATIONS

A ten-year exception to compliance with Section 3(b)(8) of the Act is provided to any cable system that "by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis in the manner required by [Section 3(b)(8) of the Act]." Cable Act of 1992, § 3(b)(8)(B).

The Commission tentatively has concluded that "cable systems which were not designed and built with (or upgraded to incorporate) addressable technology are by definition within the scope of the Act's 10-year exemption." NPRM at ¶ 6. Although supporting this conclusion, Viacom submits that the definition of addressability requires further clarification in order to meet the goal of requiring system compliance with Section 3(b)(8) only if technology permits such compliance.

Currently, many systems that are built with "addressable" technology do not have the technological ability to isolate all channels.³ For example, a system with six or eight premium channels may utilize addressable converter boxes with a limited number of "tags" (i.e., addressable channels). On these systems, other, non-addressable technology, such as traps, must be used to fully secure the various services from theft.

An example of what could be done to comply with Section 3(b)(8) by partially addressable ("hybrid") systems may be useful: These systems, in order to prevent customers who choose not to subscribe to expanded basic service from receiving that service, must block all channels dedicated to expanded basic service. Doing so requires that the operator physically place a trap (or traps) capable of preventing reception of all expanded basic service channels at the home of each BST-only subscriber. Where, for example, a single trap is installed, every channel below the trap would be capable of being received, while channels above the trap could not be received. Since Section 623(b)(7) of the Act requires that all non-superstation broadcast and PEG channels be provided as part of the BST service, the number of channels below the trap must be sufficient for and be allocated to reception of this preferred class of broadcast basic signals.

³ Indeed, the Senate Report contains an estimate that only $\frac{1}{4}$ of all systems are fully addressable. S. Rep. No. 102-92, 102d Cong. 2d Sess. (1992) at 77.

In addition, since BST-only subscribers are to be empowered to receive premium services without the expanded basic service channels which are now trapped-out, other channel capacity below the trap must also be set aside to allow for reception of the premium services. Any BST-only subscriber who wishes to subscribe to one or more premium services must then be given a converter/descrambler unit, because the premium channels located below the trap are secured by scrambling. Moreover, in partially addressable systems the number of tagged channels which are in fact addressable through the converter box depends upon the age and configuration of the addressable equipment and converter inventory being used. Consequently, it is possible that not every channel will be addressable even in "addressable" systems. Therefore, depending on the equipment in use and the location and availability of sufficiently tagged converters, some geographic areas of a system may be capable of compliance while others are not. Any regulations implementing Section 3(b)(8) must account for these imperatives.

Thus, many systems, although "addressable" in one sense, are often not capable of complying with the buy-through prohibition absent significant, and in many cases costly, modifications. Viacom submits that these "hybrid systems," see NPRM at ¶ 5, should also be within the scope of the 10-year exception to compliance with the buy-through prohibitions, because to require compliance could result in a forced investment in costly

equipment that may, by virtue of the impending rule making regarding equipment compatibility, soon be rendered obsolete.⁴ For similar reasons, Viacom submits that new systems should not be required to comply if compliance could only be achieved by installing a fully addressable system. Moreover, Viacom submits that mandatory "full" addressability (i.e., scrambling of all channels) for existing systems makes no sense for any system in a regulatory scheme which requires a broadcast basic service tier. To require addressability for channels which must be delivered to all subscribers forces a capital investment that serves no purpose, and, in fact, is extremely "consumer unfriendly" due to the fact that current addressable technology disables remote control, "cable-ready" and other popular features of many televisions and VCRs. The Act itself recognizes this as well as other equipment compatibility issues. See Cable Act of 1992, § 17. The Commission must bear in mind the direct conflict between mandating addressability as the technology of choice for implementing tier buy-through on the one hand, and Congress'

⁴ Further, the Commission must acknowledge the technological fact that if a broadcaster asserts its on-channel must-carry rights by insisting on carriage on a trapped channel, an operator's entire scheme for compliance with the anti-buy-through provision is vulnerable to collapse, and attempts to comply could be frustrated by a recalcitrant broadcaster. In such instances, broadcasters should be precluded from requiring on-channel carriage and should be compelled to arrive at a mutually agreed resolution with the cable operator with respect to the proper channel for carriage. The FCC has acknowledged this issue at paragraph 33 of the NPRM in Docket 92-259 with respect to broadcast signal carriage issues.

concern for both equipment compatibility and cost to subscribers, on the other. Unlike "full" (or even partial) addressability, other capital investments exist or are in development which are cost effective, enhance quality and functionality for subscribers, and add channel capacity for increased subscriber choice.⁵ In sum, the Commission should not require the use of fully, or even partially, addressable technology in system design -- at least until after the completion of the equipment compatibility rulemaking proceeding.

IV. CONCLUSION

In sum, Viacom submits that Section 3(b)(8) of the Act does not preclude a cable operator from offering a variety of discount packages comprised of premium services as long as all packages are available to BST-only subscribers. Accordingly, Viacom urges the Commission to adopt the above-described rate discrimination test in clear language so that cable operators do not feel constrained by the vague language of the Act from packaging and pricing premium services in a manner that benefits consumers, cable operators and programmers alike.

⁵ Such items include fiber backbone rebuilds and digital compression. These technologies will be fully explored in response to the impending proceeding dealing with equipment compatibility.

Further, Viacom cautions the Commission to consider the impact of requiring full addressability in order to ensure that systems comply with the buy-through provisions of the Act.

Respectfully submitted,

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